

Wilders vs. the Dutch Constitution: Constitutional Protection against Discriminatory Policies

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Peter J. van de Waerdt Do 2 Mrz 2017

On March 15th, the Dutch will elect a new House of Representatives. At present, two parties seem most likely to win: Geert Wilders' Freedom Party and the current Prime Minister Mark Rutte's conservative-liberal party. Of the two, Geert Wilders has certainly achieved international notoriety as a prominent figure in European far-right populism. For the upcoming elections, he is running on a platform that attacks Islam and the European Union, claiming to "Give the Netherlands back to the Dutch".

Specifically, Wilders intends to ban the Quran, close all mosques, preventively detain radical Muslims, denaturalize persons with a dual nationality if they commit a crime, close the borders for refugees, and exit from the European Union (EU). The picture of his plans, though, is blurry at best: his entire election programme is only [one page A4](#) in length, compared to the [102 pages](#) of his primary competitor Mark Rutte. Wilders rarely gives interviews and has cancelled all but two televised electoral debates. This notable lack of detail has left critics and citizens wondering how he plans to implement his sweeping proposals, and whether they are even feasible at all.

In this blog post, I will examine the feasibility of Wilders' most noteworthy proposals in light of the Dutch Constitution. I will assume for the sake of argument that his party turns out to be the largest. I will take the Quran ban as the primary example; most of the arguments below are also applicable by analogy to other policies which could infringe on the rights of minorities, unless noted differently. I do not mean to admonish or belittle the fears and feelings of discrimination that Muslims in the Netherlands may experience from Geert Wilders' statements and policies. However, I do mean to show that Dutch constitutional law is sufficiently strong to stop potential human rights derogations from a populist government in their tracks.

Passing the law: Wilders' position in the legislative procedure

First and foremost, after the elections a government will have to be formed. Usually, this is achieved by a coalition of parties who together have 76+ out of the 150 seats in the House of Representatives. Even if Wilders' party becomes the largest party by a wide margin, he will still have to cooperate with other parties in order to achieve the necessary majority. However, this will be a difficult exercise, as most other parties have already announced that they will [refuse to form a coalition](#) with Wilders. Even if Wilders receives the most votes in the upcoming elections, it is entirely possible that he will not become Prime Minister or even part of government at all.

Supposing that Wilders does manage to form a coalition, he will have to submit a law in order to ban the Quran. However, since few parties (if any) support his blanket Quran ban it will be difficult to find a majority willing to pass the law, even if his party is in the coalition. Should he manage to get the law passed in the House of Representatives, art. 85 of the Dutch Constitution provides that it still needs to be approved by the Senate as well. This will prove another hurdle for Wilders' policy. Namely, art. 55 of the Constitution provides that members of the Senate are not directly chosen by the Dutch electorate, but by the parliaments of the twelve provinces of the Netherlands. The provincial elections will not be held until [2019](#), until which time Wilders' party only has [nine out of 75 seats](#); the fourth largest.

Throughout this entire process, Wilders will have to defend his proposal from constitutional challenges from the opposition in Parliament. In addition, art. 73 of the Constitution demands that the Council of State also gives its view on proposals for legislation. While the Council of State can only give advisory opinions, it tends to be strict with derogations of constitutional rights and its opinions remain authoritative. Dutch constitutional rights that would be at

issue for a ban on the Quran are: the right to non-discrimination (art. 1); freedom of religion (art. 6); and a prohibition of censorship (art. 7). For some of Wilders' other proposals other rights would also come into play. For example, his plan to close all mosques will be confronted with the right of association (art. 8) and the right to assembly (art. 9), while preventive detention could violate privacy or personality rights (art. 10), and the principle of nulla poena (art. 16).

Nevertheless, should Wilders manage to get the Quran ban through Parliament despite all opposition, the Dutch constitutional rights will no longer be a direct concern. The Netherlands' Constitution is peculiar, as art. 120 provides that judges do not have the authority to examine the constitutionality of primary law. Neither does the Netherlands have a constitutional court which could declare a law invalid. As a result, a law that has been passed is free from constitutional scrutiny, even if it clearly violates constitutional rights such as those outlined above.

Artt. 93/94 Dutch Constitution: international treaties

On first reading, it might seem that art. 120 of the Dutch Constitution displays a great lack of constitutional protection when it comes to human rights, so if Wilders manages to make his Quran ban into primary law it could no longer be challenged at all. However, this is not the case. While laws are free from scrutiny against constitutional rights, the Dutch constitution has found a different way to protect human rights from intrusive laws.

Artt. 93 and 94 of the Dutch Constitution provide that international treaties have direct effect in the Dutch legal order, and that national laws which violates such international norms are inapplicable. As a result, Dutch citizens would be able to invoke the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and other human rights instruments to which the Netherlands is a party. Any court would then have the authority to scrutinize the Quran ban, and refuse to apply it if it violates for example the freedom of religion of art. 9 ECHR or art. 18 ICCPR. In practice it is most often the ECHR which is applied, since the courts can also call upon the extensive case law of the European Court of Human Rights.

The system of artt. 93 and 94 would become a major roadblock for any Wilders policy that would discriminate against or intrude upon the rights of minorities. After all, if Wilders wants to implement his Quran ban, he would either have to withdraw from every international human rights instrument that deals with these issues, or amend the constitution to remove artt. 93 and 94. The former would require the passing of numerous new laws, all of which again would be strongly opposed, and the latter might be even more difficult.

In order to change the Dutch Constitution, first a law to that effect must be passed by both houses of Parliament. After that, art. 137 provides that the proposal must wait until new elections, as the law must pass a second reading in a new Parliament. In this case, new elections would be in 2021. After the new Parliament convenes, the proposal for a constitutional amendment must be adopted by a two-thirds majority in both houses: only then will the amendment finally be passed. It goes without saying that this is a very difficult process. [One proposed constitutional amendment](#) in particular, which was intended to soften the aforementioned art. 120 and make constitutional scrutiny of laws possible, has laid dormant since it passed the first reading in 2008.

In the highly unlikely and time-consuming event that Wilders does manage to amend the Constitution, the Quran ban will still be subject to international oversight. After all, even if the ECHR does not have direct effect within the national legal order, art. 34 ECHR still awards an individual right to appeal. It is therefore likely that the Quran ban would result in numerous challenges before the European Court of Human Rights and costly awards for damages. In order to implement his policies effectively, Wilders would therefore still have to withdraw from the ECHR even if artt. 93 and 94 of the Dutch Constitution are no longer a concern.

Non-constitutional hurdles

Above, it has been outlined how the Dutch Constitution can, directly or via international treaties, protect Dutch citizens from proposed human rights intrusions, even if it is the largest political party proposing them. However, all of

the above is only a sample of the difficulties that Geert Wilders would face if he were to implement a ban on the Quran or numerous others of his proposed policies, at least in the overly broad and minimally detailed manner in which he has proposed them.

For example, apart from the constitutional protection awarded to Dutch citizens, a blanket ban on the Quran would also likely fall foul of European Union law. Even though it is a religious text, the Quran is also a product like any other and thus subject to the free movement of goods of the EU. A product ban in the Netherlands would have to be justified before the Court of Justice of the EU. Considering that the EU has strict rules against discrimination and that the Charter of Fundamental Rights also enshrines the freedom of religion, it is unlikely that the Court will be easily persuaded that the ban is justified. Similarly, his plans to denaturalize “criminals with a dual nationality” could lead to the loss of European citizenship, which the Court of Justice has ruled in [Rottmann](#) is only allowed if it is justified in relation to the gravity of the offence and several other factors. Wilders already wants the Netherlands to exit the EU completely, but few other parties share this view. At any rate, recent events have shown that leaving the EU is easier said than done.

Finally, the legal analysis in this blog does not even take into account the significant costs of enforcement, the potential damage to the international reputation of the Netherlands, nor indeed the human element of protests and civil disobedience.

Conclusion

Wilders recently acknowledged in [one of his rare interviews](#) that it is practically impossible to prevent people from reading the Quran, not least because of its availability on the Internet. He admitted that the ban on the Quran would at least partially be symbolic. However, because of the human rights protection provided by the Dutch Constitution and especially the high status it grants to international treaties, even mere symbolism is very far away from being realized.

In order to implement his most prominent proposals, Geert Wilders would have to find favor with other parties in two chambers of Parliament in spite of the proposals’ unconstitutionality, circumvent the direct effect granted to international treaties by either withdrawing from them or going through the lengthy and difficult procedure of amending the Constitution, exit the EU and weather public protests, only to end up with a law that he has acknowledged is practically impossible to enforce.

It is understandable that Geert Wilders inspires a certain anxiousness in those worried about the rise of populism, in minorities in general, and in people concerned about constitutional law, human rights, and the rule of law. Nevertheless, there is a world of difference between Wilders’ one-page election programme and the implementation of actual policy, with the Dutch Constitution providing a robust wall between them.

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SUGGESTED CITATION van de Waerdt, Peter J.: *Wilders vs. the Dutch Constitution: Constitutional Protection against Discriminatory Policies*, *VerfBlog*, 2017/3/02, <http://verfassungsblog.de/wilders-vs-the-dutch-constitution-constitutional-protection-against-discriminatory-policies/>, DOI: <http://dx.doi.org/10.17176/20170302-201909>.